

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

HAROLD G. ROSS,  
  
Plaintiff,  
  
v.  
  
CAROLYN W. COLVIN, Acting  
Commissioner of Social Security,  
  
Defendant.

Case No. CV 15-01203-RAO

**MEMORANDUM OPINION AND  
ORDER**

**I. INTRODUCTION**

Plaintiff Harold G. Ross (“Plaintiff”) challenges the Commissioner’s denial of his application for supplemental security income (“SSI”). For the reasons stated below, the decision of the Commissioner is AFFIRMED.

**II. PROCEEDINGS BELOW**

On January 17, 2012, Plaintiff protectively applied for SSI alleging disability beginning April 7, 2001. (Administrative Record (“AR”) 147-55). His application was denied initially on August 22, 2012, and upon reconsideration on February 22, 2013. (AR 54-80.) On March 11, 2013, Plaintiff filed a written request for hearing, and a hearing was held on September 11, 2013. (AR 99, 22-53.) Represented by

1 counsel, Plaintiff appeared and testified, along with an impartial vocational expert.  
 2 (AR 22-53.) On September 26, 2013, the Administrative Law Judge (“ALJ”) found  
 3 that Plaintiff had not been under a disability, pursuant to the Social Security Act,<sup>1</sup>  
 4 since the filing of his SSI application. (AR 18.) The ALJ’s decision became the  
 5 Commissioner’s final decision when the Appeals Council denied Plaintiff’s request  
 6 for review. (AR 1-4.) Plaintiff filed this action on June 19, 2015. (Dkt. No. 1.)

7 The ALJ followed a five-step sequential evaluation process to assess whether  
 8 Plaintiff was disabled under the Social Security Act. *Lester v. Chater*, 81 F.3d 821,  
 9 828 n.5 (9th Cir. 1995). At **step one**, the ALJ found that Plaintiff had not engaged  
 10 in substantial gainful activity since the application date. (AR 12.) At **step two**, the  
 11 ALJ found that Plaintiff has the following severe impairments: history of failed  
 12 right knee total arthroplasty surgery; right knee arthrofibrosis and contracture; left  
 13 knee patellofemoral syndrome; and degenerative disc disease of the lumbar spine.  
 14 (*Id.*) At **step three**, the ALJ found that Plaintiff “does not have an impairment or  
 15 combination of impairments that meets or medically equals the severity of one of  
 16 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.” (*Id.*)

17 Before proceeding to step four, the ALJ found that Plaintiff has the residual  
 18 functional capacity (“RFC”) to:

19 [P]erform light work.... Specifically, the claimant can lift and/or carry  
 20 20 pounds occasionally and 10 pounds frequently; he can stand and/or  
 21 walk for six hours out of an eight-hour workday with regular breaks;  
 22 he can sit for six hours out of an eight-hour workday with regular  
 23 breaks; and he is unlimited with respect to pushing and/or pulling,  
 24 other than as indicated for lifting and/or carrying, except he must not  
 25 more than occasionally push and/or pull with the bilateral lower  
 26 extremities. He can no more than occasionally stoop, kneel, crouch,  
 27 ///

---

26 <sup>1</sup> Persons are “disabled” for purposes of receiving Social Security benefits if they  
 27 are unable to engage in any substantial gainful activity owing to a physical or  
 28 mental impairment expected to result in death, or which has lasted or is expected to  
 last for a continuous period of at least 12 months. 42 U.S.C. § 423(d)(1)(A).

1 crawl, balance, and climb ramps and stairs, but he must never climb  
2 ladders, ropes, or scaffolds.

3 (AR 13.)

4 At **step four**, the ALJ found that Plaintiff had no past relevant work. (AR  
5 17.) At **step five**, based on Plaintiff's age, education, work experience, RFC, and  
6 the testimony of the vocational expert, the ALJ found that there are jobs that exist  
7 in significant numbers in the national economy that Plaintiff can perform. (AR 17-  
8 18.) Accordingly, the ALJ found that Plaintiff was not disabled. (AR 18.)

### 9 **III. STANDARD OF REVIEW**

10 Under 42 U.S.C. § 405(g), a district court may review the Commissioner's  
11 decision to deny benefits. A court must affirm an ALJ's findings of fact if they are  
12 supported by substantial evidence, and if the proper legal standards were applied.  
13 *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001). "Substantial evidence"  
14 means more than a mere scintilla, but less than a preponderance; it is such relevant  
15 evidence as a reasonable person might accept as adequate to support a conclusion."  
16 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035 (9th Cir. 2007) (citing *Robbins v. Soc.*  
17 *Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006)). An ALJ can satisfy the substantial  
18 evidence requirement "by setting out a detailed and thorough summary of the facts  
19 and conflicting clinical evidence, stating his interpretation thereof, and making  
20 findings." *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citation omitted).

21 "[T]he Commissioner's decision cannot be affirmed simply by isolating a  
22 specific quantum of supporting evidence. Rather, a court must consider the record  
23 as a whole, weighing both evidence that supports and evidence that detracts from  
24 the Secretary's conclusion." *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir.  
25 2001) (citations and internal quotations omitted). "Where evidence is susceptible  
26 to more than one rational interpretation, the ALJ's decision should be upheld."  
27 *Ryan v. Comm'r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir. 2008) (citing *Burch v.*  
28 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)); see also *Robbins*, 466 F.3d at 882

1 (“If the evidence can support either affirming or reversing the ALJ's conclusion, we  
 2 may not substitute our judgment for that of the ALJ.”). The Court may review only  
 3 “the reasons provided by the ALJ in the disability determination and may not affirm  
 4 the ALJ on a ground upon which he did not rely.” *Orn v. Astrue*, 495 F.3d 625, 630  
 5 (9th Cir. 2007) (citing *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003)).

#### 6 **IV. DISCUSSION**

7 Plaintiff contends that the ALJ: (1) failed to properly consider the opinion of  
 8 consultative examiner Vincente Bernabe, D.O., and to properly develop the record;  
 9 and (2) failed to properly consider whether Plaintiff meets or equals Listing 1.03.  
 10 (Memorandum in Support of Plaintiff’s Complaint (“Pl. Memo.”) at 2-10, Dkt. No.  
 11 17.) The Commissioner contends that the ALJ: (1) properly gave less weight to Dr.  
 12 Bernabe’s opinion; and (2) properly determined that Plaintiff did not meet or equal  
 13 a listing. (Memorandum in Support of Defendant’s Answer (“Def. Memo.”) at 5-  
 14 15, Dkt. No. 20.) For the reasons below, the Court agrees with the Commissioner.

#### 15 **A. The ALJ Properly Considered Dr. Bernabe’s Opinions**

16 Plaintiff argues that the ALJ failed to provide specific and legitimate reasons,  
 17 supported by substantial evidence, “for implicitly rejecting [Dr. Bernabe’s] opinion  
 18 that Plaintiff should never walk on uneven terrain in his 2012 examination.” (Pl.  
 19 Memo. at 3.) The Commissioner argues that the ALJ did, in fact, give “specific and  
 20 legitimate reasons for rejecting Dr. Bernabe’s opinion....” (Def. Memo. at 6.)

#### 21 **1. Dr. Bernabe’s Opinions**

22 Dr. Bernabe examined Plaintiff on two occasions and submitted three reports.  
 23 Dr. Bernabe first examined Plaintiff on April 24, 2012. (AR 258.) In his resulting  
 24 report, Dr. Bernabe began by noting the medical records he reviewed as part of his  
 25 examination and briefly summarizing Plaintiff’s medical history. (AR 258-59.) Dr.  
 26 Bernabe then proceeded to summarize his examination findings. (*See* AR 259-62.)

27 Dr. Bernabe noted that Plaintiff could move around using a single point cane  
 28 with his left hand. (AR 260.) While Plaintiff’s cervical spine, shoulders, elbows,

1 wrists, hands, ankles, and feet exhibited no abnormalities, Dr. Bernabe noted some  
2 “tender[ness] to palpitation along the greater trochanter area of the right hip,” but  
3 no range of motion issues. (See AR 260-61.) However, both tenderness *and* range  
4 of motion issues were noted with regard to Plaintiff’s lumbosacral spine. (AR 260.)

5 Dr. Bernabe found no tenderness or effusion in Plaintiff’s left knee and noted  
6 that it was “stable.” (*Id.*) Testing on Plaintiff’s left knee was normal, and ranges of  
7 motion were within normal limits. (AR 261.) Plaintiff’s surgically repaired right  
8 knee was comparatively less stable. Dr. Bernabe noted, *inter alia*, various flexion,  
9 extension, and range of motion issues and an “actual mechanical block[;]” effusion,  
10 swelling, tenderness, and warmth to the touch; and anterior instability. (*Id.*) As  
11 to motor strength, Dr. Bernabe noted that Plaintiff had some weakness in his knee  
12 extensors and flexor, but found “[n]ormal muscle bulk and tone.” (*Id.*) Moreover,  
13 no atrophy was found in Plaintiff’s right leg. (See AR 259.)

14 Regarding Plaintiff’s coordination and gait, Dr. Bernabe noted as follows:

15 The claimant walks with a significant antalgic limp. He is unable to  
16 completely extend the right leg when he walks. He favors the right  
17 leg. He is unable to walk on toes and walk on heels. He applies  
18 significant pressure to the cane when he ambulates. He had difficulty  
19 getting in and out of the chair and the examination table without help.

20 (AR 261.) Presumably in light of the foregoing summary, Dr. Bernabe opined that  
21 “[a] cane is needed for balance and support for all ambulation.” (*Id.*)

22 Dr. Bernabe diagnosed severe right knee arthrofibrosis status post failed total  
23 knee arthroplasty; greater trochanteric bursitis, right hip; degenerative disc disease,  
24 lumbar spine; and musculoligamentous strain of the lumbosacral spine. (AR 261-  
25 62.) Based on the history he obtained and his examination findings, Dr. Bernabe  
26 opined that Plaintiff would be able to push and pull occasionally; lift and carry 20  
27 pounds occasionally and 10 pounds frequently; walk and stand two hours out of an  
28 eight-hour workday; sit six hours out of an eight-hour workday; bend, kneel, stoop,

1 crawl, and crouch occasionally; and never perform agility-based activities such as  
2 walking on uneven terrain, climbing ladders, or working with heights. (AR 262.)

3 On July 26, 2012, after reviewing a radiographic report of an x-ray taken of  
4 Plaintiff's right knee on July 17, 2012, that showed relatively normal findings, Dr.  
5 Bernabe submitted an "Addendum Report." (AR 266.) In that report, Dr. Bernabe  
6 opined, in part, that Plaintiff can push, pull, lift, and carry 50 pounds occasionally  
7 and 20 pounds frequently; walk and stand six hours out of an eight-hour workday;  
8 sit six hours out of an eight-hour workday; needs a cane for balance and support  
9 during prolonged ambulation; can bend, kneel, stoop, crawl, and crouch frequently;  
10 and can never walk on uneven terrain, climb ladders, or work with heights. (*Id.*)

11 Dr. Bernabe conducted another examination of Plaintiff on January 28, 2013.  
12 (AR 276.) After again summarizing Plaintiff's medical history, and mentioning the  
13 examination Terrance P. Flanagan, M.D., conducted on August 15, 2012, *see infra*,  
14 Dr. Bernabe summarized his examination findings. Dr. Bernabe noted that Plaintiff  
15 moved in and out of the office and examination room with a single-point cane and  
16 favored his right side, but was "able to walk unassisted without a cane." (AR 278.)  
17 Plaintiff was also able to toe and heel walk, but could not squat. (*Id.*)

18 Dr. Bernabe further noted tenderness and less than normal range of motion in  
19 the lumbosacral region of Plaintiff's spine. (*Id.*) However, range of motion was  
20 normal in all other joints except for Plaintiff's knees. (AR 279.) As for Plaintiff's  
21 knees, Dr. Bernabe noted patellofemoral grinding in the left knee, and tenderness  
22 and arthrofibrosis in the right knee. (*Id.*) Dr. Bernabe noted no evidence of atrophy  
23 and also found that "[m]otor strength is grossly within normal limits[.]" (AR 280.)

24 Dr. Bernabe diagnosed arthrofibrosis right knee, status post right total knee  
25 replacement, chondromalacia patella left knee, and lumbar musculoligamentous  
26 strain. (*Id.*) Based on his examination, Dr. Bernabe opined that Plaintiff could lift  
27 and carry 20 pounds occasionally and 10 pounds frequently; walk and stand six  
28 hours out of an eight-hour workday; sit six hours out of an eight-hour workday;

1 push and pull and perform postural and agility-based movements occasionally; and  
2 did not medically need to use an assistive device. (AR 280-81.)

## 3 **2. Dr. Flanagan's Opinion**

4 Between Dr. Bernabe's evaluations, Plaintiff was evaluated by Dr. Flanagan,  
5 who submitted a summary report of his evaluation on August 15, 2012. (AR 267-  
6 72.) Like Dr. Bernabe, Dr. Flanagan first summarized Plaintiff's medical history  
7 and also noted the medical records he reviewed as part of his evaluation. (AR 267-  
8 68.) Dr. Flanagan then summarized his examination findings. (AR 269-71.)

9 Regarding Plaintiff's station and gait, Dr. Flanagan noted, *inter alia*, that he  
10 stood with all his weight over his left knee, but was able to rise from his chair with  
11 minimal difficulty and get on and off the examining table with no difficulty. (AR  
12 269.) Plaintiff's gait was slightly antalgic on the left and he was unable to walk on  
13 tiptoes and heels, despite no evidence of ankle weakness, but he walked across the  
14 examination room with only mild difficulty utilizing a single-point cane. (*Id.*)

15 Like Dr. Bernabe, Dr. Flanagan noted that Plaintiff had a full range of motion  
16 and no abnormalities in his neck, shoulders, elbows, wrists, hands, hips, and ankles.  
17 (AR 269-70.) Unlike Dr. Bernabe, Dr. Flanagan noted no range of motion issues or  
18 tenderness in Plaintiff's back. (AR 269.) Dr. Flanagan noted no range of motion  
19 issues in Plaintiff's left knee—although he did note that the range of motion testing  
20 resulted in some pain—but some range of motion issues in Plaintiff's right knee, as  
21 well as “diffuse palpatory tenderness over the right knee.” (AR 270.) No atrophy  
22 was found and Plaintiff's motor strength was “grossly within normal limits.” (*Id.*)

23 Dr. Flanagan diagnosed sequelae of right total knee arthroplasty, right knee  
24 contracture formation, left patellofemoral syndrome, and lumbar degenerative joint  
25 disease.<sup>2</sup> (AR 271.) Based on his examination, Dr. Flanagan opined that Plaintiff

---

26  
27 <sup>2</sup> Dr. Flanagan noted that “[a]lthough the claimant does not specifically complain of  
28 lower back pain on examination today, the medical records do suggest that there are  
degenerative changes based on x-ray.” (AR 271.)



1 could lift, carry, push, and pull 20 pounds occasionally and 10 pounds frequently;  
 2 stand and walk six hours out of an eight-hour workday; sit six hours out of an eight-  
 3 hour workday; and climb, stoop, kneel, and crouch frequently. (*Id.*) Dr. Flanagan  
 4 noted no agility-based activity limitations and, like Dr. Bernabe, stated that “[t]he  
 5 use of an assistive device is not medically necessary.” (*Id.*)

### 6 **3. Pertinent Law**

7 An ALJ is obligated to consider medical opinions of record, resolve conflicts,  
 8 and analyze evidence. *Magallanes*, 881 F.2d 747, 750 (9th Cir. 1989); 20 C.F.R.  
 9 § 416.927(c). Courts give varying degrees of deference to medical opinions based  
 10 on the provider: (1) treating physicians who examine and treat; (2) examining  
 11 physicians who examine, but do not treat; and (3) non-examining physicians who  
 12 do not examine or treat. *Valentine v. Comm’r, Soc. Sec. Admin.*, 574 F.3d 685, 692  
 13 (9th Cir. 2009). When an examining physician’s opinion is contradicted by another  
 14 opinion, the ALJ can reject the examining physician’s opinion, in whole or in part,  
 15 by providing specific and legitimate reasons supported by substantial evidence in  
 16 the record. *See Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir. 2014).

### 17 **4. Discussion**

18 The ALJ gave Dr. Bernabe’s opinions significant, but not full weight, in part,  
 19 because Dr. Bernabe “underestimated [Plaintiff’s] ability to perform agility-based  
 20 activities[,]” including walking on uneven terrain. (AR 16.)<sup>3</sup> Specifically, the ALJ  
 21 found that Dr. Bernabe’s agility-based activities findings were not supported by the  
 22 medical evidence, including the benign clinical and diagnostic findings. (*Id.*) That

---

23 <sup>3</sup> Plaintiff contends that “the ALJ did not expressly state whether he accepted or  
 24 rejected Dr. Bernabe’s opinion that Plaintiff should never walk on uneven terrain.”  
 25 (Pl. Memo. at 3.) Plaintiff is incorrect. The ALJ rejected Dr. Bernabe’s assessment  
 26 of Plaintiff’s ability to perform agility-based activities, which *Dr. Bernabe* defined  
 27 in his opinion as “*walking on uneven terrain*, climbing ladders, working with  
 28 heights[.]” (AR 16, 262 (emphasis added).) Therefore, in rejecting Dr. Bernabe’s  
 agility-based activities assessment, the ALJ also rejected Dr. Bernabe’s assessment  
 with regard to Plaintiff’s ability to walk on uneven terrain.



1 is a specific and legitimate reason to discount Dr. Bernabe's assessment. *Thomas v.*  
2 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002) (an ALJ need not accept a physician's  
3 opinion if that opinion is inadequately supported by clinical findings).

4 The ALJ's finding is also supported by substantial evidence in the record. As  
5 noted above, the objective medical evidence obtained around the period of time that  
6 Drs. Bernabe and Flanagan examined Plaintiff was relatively benign. So much so,  
7 in fact, that when Dr. Bernabe received the July 17, 2012, radiographic report of an  
8 x-ray of Plaintiff's right knee, he amended his limitations assessment—increasing  
9 the amount of weight that Plaintiff could push, pull, lift, and carry, the amount of  
10 time that Plaintiff could stand and walk, and the frequency at which Plaintiff could  
11 perform postural activities; and finding that Plaintiff needed to use a cane only for  
12 balance and support during *prolonged* ambulation. In Dr. Bernabe's original report,  
13 he opined that Plaintiff needed a cane for balance and support for *all* ambulation.

14 Dr. Flanagan's examination notes and overall opinion also support the ALJ's  
15 agility-based activities finding. As noted above, Dr. Flanagan noted, *inter alia*, that  
16 Plaintiff was able to rise from his chair with minimal difficulty and get on and off  
17 the examining table with no difficulty. Dr. Flanagan further noted that Plaintiff was  
18 able to walk across the examination room with only mild difficulty while using his  
19 single-point cane. To be sure, Dr. Flanagan noted a number of seemingly contrary  
20 findings, including range of motion issues and tenderness in Plaintiff's right knee.  
21 However, Dr. Flanagan found no atrophy and noted that Plaintiff's motor strength  
22 was "within normal limits." Dr. Flanagan further noted no limitations as to agility-  
23 based activities and found that use of an assistive device is not medically necessary.

24 Finally, in addition to the modified findings mentioned above, Dr. Bernabe's  
25 opinions after his second examination evolved, and/or Plaintiff's physical condition  
26 improved, in ways that further support the ALJ's finding. For example, whereas in  
27 April 2012 Dr. Bernabe noted that Plaintiff could move using a single point cane, in  
28 January 2013, Dr. Bernabe noted that Plaintiff could walk unassisted. Whereas in

1 April 2012 Dr. Bernabe noted some weakness in Plaintiff's right knee, in January  
 2 2013, Dr. Bernabe found that Plaintiff's motor strength was grossly within normal  
 3 limits. And whereas in April 2012, and again in July 2012, Dr. Bernabe opined that  
 4 Plaintiff should never perform agility-based activities, in January 2013, Dr. Bernabe  
 5 opined that Plaintiff could occasionally perform such activities.

6 In sum, the Court concludes that the ALJ's reason for rejecting Dr. Bernabe's  
 7 agility-based activities assessment is a specific and legitimate reason, supported by  
 8 substantial evidence in the record, and must therefore be upheld by this Court.

9 **B. The ALJ Did Not Have a Duty to Further Develop the Record**

10 Plaintiff next contends that by not recontacting Dr. Bernabe and Dr. Flanagan  
 11 concerning various conflicts in their opinions, the ALJ violated his duty to fully and  
 12 fairly develop the record in this matter. (*See* Pl. Memo. at 3-5.) The Commissioner  
 13 contends that Plaintiff has plainly "failed to demonstrate that the ALJ had a duty to  
 14 further develop the record in this regard." (*See* Def. Memo. at 9-10.)

15 ALJs generally have a duty to further develop the record only if the evidence  
 16 is ambiguous or inadequate to allow them to make a decision. *See Mayes*, 276 F.3d  
 17 at 459–60. Similarly, an "ALJ is required to recontact a doctor only if the doctor's  
 18 report is ambiguous or insufficient for the ALJ to make a disability determination."  
 19 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005) (citations omitted).

20 Here, Plaintiff does not argue that either doctor's opinion is ambiguous. And  
 21 the ALJ—supported by the record, as discussed above—found that the evidence is  
 22 adequate to make a decision. Accordingly, the ALJ did not have a duty to recontact  
 23 the doctors, and did not violate his duty to fully and fairly develop the record.<sup>4</sup>

---

24  
 25 <sup>4</sup> Furthermore, to the extent the Plaintiff contends that the ALJ should have ordered  
 26 additional testing, the Court notes that, generally, the *claimant* must prove that he  
 27 or she is disabled by furnishing medical and other evidence that the Social Security  
 28 Administration can use to reach conclusions about his or her medical impairment.  
 20 C.F.R. § 416.912. Moreover, the Social Security Administration ordered three  
 orthopedic consultative examinations before making a determination in this matter.

1           **C.     Plaintiff’s Impairments Do Not Meet or Equal Listing 1.03**

2           Finally, Plaintiff contends: (1) that the evidence of record clearly establishes  
3 that he met or equaled the criteria for Listing 1.03; and (2) that “[u]nfortunately, the  
4 ALJ did not provide the proper analysis in his decision to support [h]is [step three]  
5 finding or he more than likely would have determined that plaintiff did indeed meet  
6 the Listing.” (Pl. Memo. at 6.) The Commissioner contends that Plaintiff failed to  
7 establish that his impairments meet or equal Listing 1.03. (Def. Memo. at 10-14.)

8           “The listings define impairments that would prevent an adult, regardless of  
9 his age, education, or work experience, from performing *any* gainful activity[.]”  
10 *Sullivan v. Zebley*, 493 U.S. 521, 532, 110 S. Ct. 885, 107 L. Ed. 2d 967 (1990)  
11 (emphasis in original). If a claimant’s impairment (or combination of impairments)  
12 meets or equals a “listed impairment[], the claimant is conclusively presumed to be  
13 disabled. If [it] is not one ... conclusively presumed to be disabling, the evaluation  
14 proceeds to” step four. *Bowen v. Yuckert*, 482 U.S. 137, 141, 107 S. Ct. 2287, 96 L.  
15 Ed. 2d 119 (1987); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

16           “To *meet* a listed impairment, a claimant must establish that he or she meets  
17 each characteristic of a listed impairment relevant to his or her claim.” *Tackett*, 180  
18 F.3d at 1099 (emphasis in original). “To *equal* a listed impairment, a claimant must  
19 establish symptoms, signs and laboratory findings ‘at least equal in severity and  
20 duration’ to the characteristics of a relevant listed impairment, or, if a claimant's  
21 impairment is not listed, then to the listed impairment ‘most like’ the claimant's  
22 impairment.” *Id.* (emphasis in original) (citing 20 C.F.R. § 404.1526).

23           As an initial matter, contrary to Plaintiff’s contentions, the record in this case  
24 establishes that Plaintiff *did not* meet the criteria for Listing 1.03. To meet Listing  
25 1.03, a claimant must establish that he or she is unable to ambulate effectively. 20  
26 C.F.R. pt. 404, subpt. P, App. 1, § 1.03. Inability to ambulate effectively is defined  
27 as “an *extreme* limitation of the ability to walk; i.e., an impairment(s) that interferes  
28 *very seriously* with the individual’s ability to independently initiate, sustain, or

1 complete activities.” 20 C.F.R. pt. 404, subpt. P, App. 1, § 1.00.B.2.b.1 (emphasis  
2 added). In light of the discussion and analysis set forth above, *see supra* § IV(A),  
3 the Court finds that Plaintiff failed to show an extreme or very serious limitation in  
4 his ability to ambulate within the meaning set forth in the regulations.

5 Plaintiff’s equivalency argument fails for three reasons. First, aside from  
6 Plaintiff’s counsel’s passing reference to Listing 1.02(A)—major dysfunction of a  
7 joint with involvement of one major peripheral weight-bearing joint, resulting in  
8 inability to ambulate effectively—in his opening statement at the hearing, it does  
9 not appear that Plaintiff made any concerted effort to present evidence establishing  
10 equivalence. (*See, e.g.*, AR 24-53.) Failure to do so is fatal to a claim that the ALJ  
11 erred in analyzing equivalency at step three. *See Burch*, 400 F.3d at 679.

12 Second, given the discussion and analysis set forth above, *see supra* § IV(A),  
13 and elsewhere within the ALJ’s decision, Plaintiff quite simply has not established  
14 symptoms, signs and/or laboratory findings at least equal in severity and duration to  
15 the characteristics of a listed impairment—whether it be Listing 1.03 or another of  
16 the impairments listed in the regulations. *See Tackett*, 180 F.3d at 1099. The mere  
17 presence of multiple impairments, even multiple severe impairments, is insufficient  
18 alone to establish equivalency. “Listed impairments are purposefully set at a high  
19 level of severity because ‘the listings were designed to operate as a presumption of  
20 disability that makes further inquiry unnecessary.’” *Kennedy v. Colvin*, 758 F.3d  
21 1172, 1176 (9th Cir. 2013) (citing *Sullivan*, 493 U.S. at 532). “Listed impairments  
22 set such strict standards because they automatically end the five-step inquiry, before  
23 residual functional capacity is even considered.” *Id.*

24 Third, Plaintiff’s claim that the Court should remand for an award of benefits  
25 or further proceedings because the ALJ did not properly explain his determination  
26 that Plaintiff did not have an impairment or combination of impairments that meets  
27 or medically equals a listed impairment (and specifically Listing 1.03), also fails.

28 ///

1 In support of his argument, Plaintiff cites to *Marcia v. Sullivan*, 900 F.2d 172  
2 (9th Cir. 1990), for the proposition that “in determining whether a claimant equals a  
3 listing under step three of the ... disability evaluation process, the ALJ must explain  
4 adequately his evaluation of ... the combined effects of the impairments.” *Id.* at  
5 176; *see also* Pl. Memo. at 8-9. In doing so, presumably, Plaintiff contends that the  
6 ALJ’s cursory analysis within the step three section of his hearing decision, which  
7 Plaintiff references at the outset of his listing argument (*see* Pl. Memo. at 5), was  
8 insufficient. In that section, the ALJ states as follows:

9 The undersigned considered the claimant’s impairments under the  
10 Listings. The claimant’s impairments, considered singly and in  
11 combination, do not meet or medically equal the criteria of any  
12 medical listing. No treating or examining physician has recorded  
13 findings equivalent in severity to the criteria of any listed impairment,  
14 nor does the evidence show medical findings that are the same or  
15 equivalent to those of any listed impairment.

16 (AR 12-13.)

17 However, as the Commissioner rightly notes, though boilerplate findings are  
18 insufficient to support a conclusion that a claimant’s impairment(s) do not meet or  
19 equal a listing, the Ninth Circuit has clarified that “*Marcia* simply requires an ALJ  
20 to discuss and evaluate the evidence that supports his or her conclusion; it does not  
21 specify that the ALJ must do so under the heading ‘Findings.’” *Lewis v. Apfel*, 236  
22 F.3d 503, 513 (9th Cir. 2001). A cursory step three analysis may therefore be cured  
23 by a proper discussion and evidentiary evaluation elsewhere in the ALJ’s decision.  
24 Here, the ALJ devoted at least three pages to the discussion and evaluation of the  
25 evidence that supports his conclusions. (*See* AR 14-17.) The Court finds that the  
26 ALJ’s evaluation of the evidence is sufficient to support his step three conclusion.

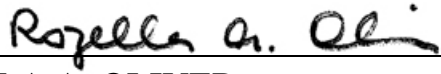
27 In sum, the Court concludes that the ALJ supported his findings of fact with  
28 substantial evidence and applied the proper legal standards. Accordingly, the Court  
must uphold the ALJ’s decision.

1 **V. CONCLUSION**

2 IT IS ORDERED that Judgment shall be entered AFFIRMING the decision  
3 of the Commissioner denying benefits.

4 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this  
5 Order and the Judgment on counsel for both parties.

6  
7  
8 DATED: February 26, 2015

  
\_\_\_\_\_  
ROZELLA A. OLIVER  
UNITED STATES MAGISTRATE JUDGE

10  
11  
12 **NOTICE**

13 **THIS DECISION IS NOT INTENDED FOR PUBLICATION IN WESTLAW,  
14 LEXIS/NEXIS, OR ANY OTHER LEGAL DATABASE.**  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28